

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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PETITION NO. P5-03

**PETITION OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS
ASSOCIATION OF AMERICA, INC. FOR LIMITED EXEMPTION FROM
CERTAIN TARIFF REQUIREMENTS OF THE SHIPPING ACT OF 1984**

**MOTION OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS
ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE PLEADINGS OR,
IN THE ALTERNATIVE, FOR THE COMMISSION TO TAKE OFFICIAL NOTICE**

Pursuant to the provisions of Rule 73 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.73, the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") requests that the Commission accept the attached pleadings for filing in this docket. Alternatively, the NCBFAA requests that the Commission take judicial or official notice, in accordance with Rules 160 and 161, 46 C.F.R. §§ 502.160 & 161, of the attached pleadings when deciding the issues raised in this docket.

The NCBFAA has attached a Petition Of American President Lines, Ltd., And APL Co. Pte. Ltd., For A Full Exemption From The First Sentence Of Section 9(c) Of The Shipping Act Of 1984, As Amended, which was filed on or about September 20, 2004, as well as the NCBFAA's Comments filed this date in response to APL's Petition. The NCBFAA believes that these materials are directly relevant to the issues being decided by the Commission in this docket, as the positions taken by APL in support of its own Petition in Docket No. P5-04 are inconsistent with or directly contradictory to positions it has taken in response to the NCBFAA's

exemption request in Docket No. P5-03. The NCBFAA accordingly believes that the Commission should have the benefit of reviewing APL's Petition, as well as the NCBFAA's Reply, when it decides the issues involved in Docket No. P5-03.

Accordingly, the NCBFAA respectfully requests that the attached pleadings be filed as part of the official record in Docket No. P5-03. Alternatively, the NCBFAA requests that the Commission issue an order by which it will take judicial or official notice of the attached documents when deciding the issues in this proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of October, 2004, served a copy of the foregoing Motion Of The National Customs Brokers And Forwarders Association Of America, Inc. For Leave To File Pleadings Or, In The Alternative, For The Commission To Take Official Notice, on the following persons listed below via first-class mail, postage pre-paid:

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**BEFORE THE
FEDERAL MARITIME COMMISSION**

PETITION NO. P5-04

**PETITION OF
AMERICAN PRESIDENT LINES, LTD. AND
APL CO. PTE. LTD.
FOR A FULL EXEMPTION FROM THE
FIRST SENTENCE OF SECTION 9(c)
OF THE SHIPPING ACT OF 1984, AS AMENDED**

Pursuant to 46 C.F.R. 502.69 and Section 16 of the Shipping Act of 1984 ("Act"), as amended, American President Lines, Ltd. ("APL Lines") and APL Co. Pte. Ltd. ("APL Co.") petition for a full exemption from the first sentence of Section 9(c) of the Act to permit them to reduce their tariff rates, charges, classifications, rules or regulations effective upon publication. Although APL Lines and APL Co. do not as of the time of this filing meet the statutory definition of controlled carrier, it is anticipated, as discussed below, that they may be considered to be controlled carriers within the meaning of the Act in the very near future. Accordingly, we request that this Petition be expedited to the maximum extent feasible.

1. The Occasion For This Petition

APL Lines operates liner services in the U.S.-foreign trade employing 17 U.S.-flag vessels. Nine of those vessels are operated pursuant to Maritime Security Program Operating Agreements with the U.S. Maritime Administration. All of the vessels are enrolled in the Voluntary Intermodal Security Agreement program of the Department of Defense. APL Lines has operated U.S.-flag vessels for more than 150 years. In 1997 APL Lines was acquired by

Neptune Orient Lines Limited ("NOL"), a Singapore company listed on the Singapore Exchange with its shares held by more than 500 shareholders.

NOL is also the ultimate parent of APL Co., which operates a large fleet of Singapore and other foreign-flag vessels in worldwide liner service. NOL was incorporated in 1968, at which time it was wholly owned by the Government of Singapore through a holding company, Temasek Holdings (Private) Limited ("Temasek"). As a result, NOL was classified as a "controlled carrier" on June 8, 1979. During succeeding years Temasek reduced its holdings in NOL, and as of March 22, 1989, when those holdings were reduced below 50%, the Commission removed NOL from the controlled carrier classification. In 1997, at the time NOL acquired APL Lines, Temasek's ownership interest in NOL approximated 33.5%. At that time, Temasek represented to the United States government – in a September 26, 1997 letter to the Maritime Administration confirming the accuracy of a September 22, 1997 filing with the Committee on Foreign Investment in the United States as related to Temasek – that Temasek held the NOL stock "as a passive minority financial investor."

On August 17, 2004, Temasek, whose holdings in NOL were then slightly below 30%, made a cash offer for the purchase of the remaining shares in NOL through a wholly owned subsidiary, Lantor Investments Pte. Ltd. In the offering papers (which are attached as Exhibit 1 hereto), Temasek represented [§ 10.2] that:

"It is the intention of the Offeror [Temasek] that NOL continues with its existing activities. Accordingly, the Offeror currently has no intentions for any major changes relating to the business of NOL (including any redeployment of fixed assets) nor any changes relating to the continued employment of employees of NOL and its subsidiaries."

According to official reports by Temasek, Temasek's ownership interest in NOL is currently less than 50%. However, based on the shares that were tendered in response to the

August 17, 2004 offer to purchase, Temasek's ownership interest in NOL will exceed 50% in a matter of days, and in result the Commission may classify APL Lines and APL Co. as controlled carriers within the meaning of the Act and subject them to the requirements of Section 9 of the Act. This Petition seeks an exemption from the requirements of Section 9(c), which imposes on controlled carriers a 30-day delay from publication before tariff rates, charges, classifications, rules or regulations that result in a reduction may become effective.

2. The Exemption Should Be Granted

Under Section 16 of the Act, the Commission may grant an exemption from a requirement of the Act, if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. Only last April, the Commission entered these determinations in a context that makes them fully applicable here. These were Docket No. P3-99, *Petition of China Ocean Shipping (Group) Company*, 30 SRR 187 (F.M.C., April 1, 2004); Docket No. P4-03, *Petition of China Shipping Container Lines, Ltd.*, 30 SRR 193 (F.M.C., April 1, 2004); Docket No. P6-03, *Petition of Sinotrans Container Lines Co., Ltd.*, 30 SRR 197 (F.M.C., April 1, 2004).

In those proceedings, the three named petitioners, all carriers subject to the control of the Peoples Republic of China, petitioned for the exemption that APL Lines and APL Co. are seeking here. Grant of the exemption was universally supported by all commentators, including the U.S. Departments of State and Transportation, major associations of shippers as well as individual shippers, and APL Lines and Maersk Sealand.^{1/} The comments identified that the grant of the exemption would advance competition – because in the absence of the exemption the

^{1/} Initial concerns expressed by APL Lines and Maersk Sealand addressed to the availability of reciprocal treatment of U.S. carriers by the PRC were resolved following the adoption of the U.S.-China Bilateral Maritime Agreement.

Chinese carriers would be hobbled in responding to competitive requirements for cargo that moves subject to tariff – and also that the exemption would advance commerce by increasing the options available to shippers. Indeed, one commentator stressed more generally that “[s]imilar exemptions should be granted to all controlled carriers whom the Commission ascertains have similar commercial attributes [to the Chinese carriers] * * *.” Docket No. P6-03, Comments of the American Institute For Shippers’ Associations, Inc., In Support of the Petition, pp. 3-4 (Aug. 20, 2003).

The Commission’s findings favorable to the grant of the requested exemptions are fully consistent with the arguments advanced in the Petitions of the Chinese carriers and in the supporting comments. On the first of the Section 16 criteria – impact on competition – the Commission found, in largely identical terms applicable to all three carriers (30 SRR at 192, 196-97, 200):

“[The Chinese carriers’] arguments regarding carrier competition appear to have merit. [The carriers’] burden as petitioner[s] is to establish that the exemption will not result in a substantial reduction in competition. [The carriers] go[] further, however, and argue[] persuasively that, at least in one regard, the exemption [they] seek[] will actually promote competition; allowing [them] more flexibility to reduce [their] rates effective immediately without reference to competitors’ rates would seem to result in an instantaneous increase in competition among carriers. This position appears to be amply supported by the shippers’ comments on the Petition, which demonstrate that some shippers would like to use [the carriers’] service but do not because of the 30-day delay. Furthermore, [the carriers’] assertions are unopposed by any commenters.”

And as to the second of the Section 16 criteria – detriment to commerce – the Commission found [*id.*]:

“[The carriers’] uncontested argument that the exemption will not be detrimental to commerce also appears to be valid. By allowing [the carriers] to compete more effectively for time-sensitive cargo,

shippers will be given more service options in a more competitive carrier market. Again, this point is well-supported by [the carriers'] customers' statements and is unopposed."

These findings have full application to APL Lines and APL Co. Combined, these two companies in 2003 were ranked as the fourth largest liner operators in the U.S.-foreign commerce, and the third largest in the transPacific trades. In 2003, APL Lines and APL Co. carried cargo for approximately 20,000 shippers, including most of the major exporters and importers shipping from and into the United States. It is universally recognized that APL Lines and APL Co. provide premium service, an ability that they can continue to achieve only if they remain fully competitive in terms of price as well as service.

While the large preponderance of the cargo now carried by APL Lines and APL Co. moves pursuant to service contracts, in 2003 the two companies moved almost 70,000 TEU of cargo for more than 1,000 shippers at tariff rates. The cargoes that move at tariff rates represent important markets for APL, including all westbound cargo from Alaska, commercially important refrigerated cargo moving westbound across the Atlantic, project cargo, cargo moving for shippers whose volumes are too limited to warrant entering into a service contract, and – of direct importance to the United States Government – humanitarian aid cargo and embassy cargo shipped or sponsored by the Government and for which the freight charges are paid or reimbursed by the Government. If APL is unable to reduce its rates for these cargoes on less than 30 days' notice, it will be rendered noncompetitive for such cargoes not only to APL's material detriment but to the Government's as well.

While it now appears that NOL (and in result APL Lines and APL Co.) will shortly be subject to the control of Temasek, an entity owned by the Singapore government, NOL's commercial, free-market orientation will remain unchanged. As identified above, p. 2, in the

legal document issued to shareholders incident to its August 17 offer, Temasek represented that “it has no intentions for any major changes relating to the business of NOL.” The description of Temasek in that document also identifies Temasek’s extensive corporate holdings – in the United States and throughout Asia in addition to Singapore – and establishes the entirely commercial focus of Temasek’s investing aimed at “maximiz[ing] long-term shareholders value.” [Exhibit 1 at Section 8.2 and Appendix 4.] More generally, Singapore operates under a free-market economy. This is best evidenced by the United States-Singapore Free Trade Agreement that was concluded in January 2003, which, as the recitals in the Preface to the Agreement identify, is explicitly grounded in the mutual recognition of the two countries, *inter alia*, that “open and competitive markets are the key drivers of economic efficiency,” of “the importance of ongoing liberalization of trade in goods and services at the multilateral level,” and of the mutual desire “to promote competition.” United States-Singapore Free Trade Agreement, Jan. 15, 2003, ____ U.S.T. ____ (entered into force Jan. 1, 2004). In this context, the statutory concerns underlying the Controlled Carrier legislation – the rate behavior of state-controlled carriers that are not required to earn profits and whose “major motivation is the maximization of hard currency (earnings) rather than the maximization of profits”² – have neither relevance nor application.

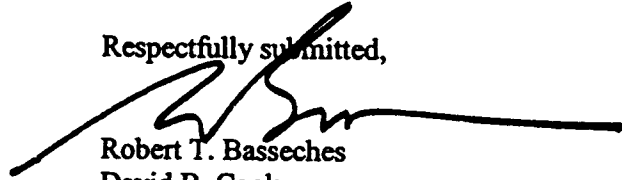
3. The Need for Expedited Action

As explained at the outset, it is possible that the controlled carrier provisions of the Act may be considered applicable to APL Lines and APL Co. within a matter of days. The events giving rise to the possible application of the controlled carrier provisions of the Act to APL Lines and APL Co. were not only wholly unexpected but, importantly, will have no significance to those carriers’ market behavior. Given (i) the large potential adverse impact of the 30-day delay

² See, e.g., Report No. 95-1260, 95th Cong., 20 Sess. at 3.

provision of Section 9(c) on APL Lines' and APL Co.'s operations, as well upon shippers – including the United States Government – that heavily rely on APL's services, and (ii) the Commission's recent, clear recognition in the context of the Chinese carriers' exemption proceedings that an exemption from that provision will advance the statutory objectives, we urge that this Petition be noticed with an abbreviated comment period so as to permit Commission action on and grant of the exemption requested in this Petition at the earliest feasible date.

Respectfully submitted,



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September 20, 2004

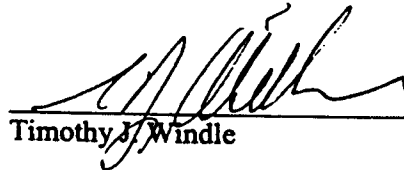
**BEFORE THE
FEDERAL MARITIME COMMISSION**

PETITION NO. _____

**PETITION OF
AMERICAN PRESIDENT LINES, LTD. AND
APL CO. PTE. LTD.
FOR A FULL EXEMPTION FROM THE
FIRST SENTENCE OF SECTION 9(c)
OF THE SHIPPING ACT OF 1984, AS AMENDED**

DECLARATION OF TIMOTHY J. WINDLE

I am Timothy J. Windle, General Counsel of American President Lines, Ltd. I have read the foregoing Petition of American President Lines, Ltd. and APL Co. Pte. Ltd. For a Full Exemption From the First Sentence of Section 9(c) of the Shipping Act of 1984, as Amended ("Petition"). I declare under penalty of perjury that, based on personal knowledge or inquiry to persons with relevant knowledge, the facts stated in the Petition are true and correct to the best of my knowledge and belief.



Timothy J. Windle

September 20, 2004

**BEFORE THE
FEDERAL MARITIME COMMISSION**

PETITION NO. P5-04

**PETITION OF AMERICAN PRESIDENT LINES, LTD., AND APL CO. PTE. LTD., FOR
A FULL EXEMPTION FROM THE FIRST SENTENCE OF SECTION 9(C) OF THE
SHIPPING ACT OF 1984, AS AMENDED**

**COMMENTS OF THE NATIONAL CUSTOMS BROKERS
AND FORWARDERS ASSOCIATION OF AMERICA, INC.**

American President Lines, Ltd. and APL Co. PTE. Ltd. ("APL") recently filed a petition with the Commission seeking an exemption from the first sentence of Section 9(c) of the Shipping Act of 1984. In a Notice served September 23, 2004, the Commission invited interested persons to submit their views on the issues raised. In accordance with the Notice, the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") is filing its comments.

APL seeks an exemption from the requirements of Section 9(c), which requires so-called "controlled carriers" (a status which APL may attain in the near future) to delay the effectiveness of tariff rate reductions by 30 days. While supporting APL's petition, the NCBFAA believes that the Commission should be made aware of several inconsistencies between APL's position in this proceeding as compared to what it has stated either directly or as a member of the World Shipping Council ("WSC"), in FMC Docket No. P5-03 with regard to the Association's petition seeking exemption from rate tariff publication.

The NCBFAA notes, first, that APL has not provided any evidence to support its contention that the requested exemption is both appropriate and necessary. APL relies instead on comments filed by U.S. governmental agencies and various shipper organizations that were submitted in the similar exemption proceedings initiated by Chinese carriers last year.¹ While NCBFAA believes that the relief sought is appropriate, it cannot help but note that APL and the WSC criticized the Association's petition for the alleged failure to supply evidence in support of the exemption petition.² This allegation, of course, was inaccurate, as the record in P5-03 (and the other NVOCC exemption proceedings) is replete with supporting, detailed statements from NVOCC's, shippers, government agencies, and members of Congress that tariff rate publication is pointless, cumbersome and unnecessarily costly. Nonetheless, and although the NCBFAA agrees that APL should be granted such relief, by relying solely on comments filed in other dockets APL failed to provide evidentiary support for its request.

Second, APL argued, in Docket P5-03, that Section 16 of the Act did not authorize the Commission to exempt parties from statutory requirements only recently addressed by Congress in the Ocean Shipping Reform Act. (APL Comments in Reply to the Petitions, filed October 10, 2003 in Docket Nos. P5-03, *et al.*, at 23-26; Further Comments of APL in Reply to the Petitions, in the same dockets, filed January 16, 2004, at 31-32.) The NCBFAA has explained at length, in

¹Docket No. P3-99, *Petition of China Ocean Shipping (Group) Company*, 30 SRR 187 (F.M.C., April 1, 2004); Docket No. P4-03, *Petition of China Shipping Container Lines, Ltd.*, 30 SRR 193 (F.M.C., April 1, 2004); Docket No. P6-03, *Petition of Sinotrans Container Lines Co., Ltd.*, 30 SRR 197 (F.M.C., April 1, 2004).

² In the Comments of World Shipping Council filed October 10, 2003 in Docket Nos. P3-03, P5-03, P7-03, P8-03 and P9-03, at 11-12, the WSC stated:

... [T]he Commission has properly interpreted Section 16 as requiring a solid factual record as a mandatory prerequisite to the granting of any exemption.

Docket No. P5-03, why APL's contention on this issue was wrong, and that Congress gave the Commission complete discretion to use its expertise to exempt regulated parties from any requirement of the Act. If the Commission has the authority to exempt controlled carriers from Section 9(c) of the Act -- which provision was clearly specifically addressed by Congress during the enactment of OSRA³ -- it also has the authority to grant relief concerning the rate tariff publication requirement in Section 8. In other words, APL's view of the reach of Section 16 is clearly self-serving, being dependent upon the identity of the party seeking the Commission's exercise of that authority. Regardless, the Commission clearly has the authority to grant the requested exemption.

Finally, the NCBFAA supports APL's petition because it is pro-competitive and not detrimental to commerce, which are of course the criteria that a petitioner must satisfy under Section 16. In support of its petition, APL cites the Commission's decision in the *China Shipping* case, which held that the ability to "reduce [their] rates effective immediately without reference to competitors' rates would seem to result in an instantaneous increase in competition among carriers." APL Petition at 4. Similarly, APL cites the *China Shipping* case for the proposition:

Allowing [the carriers] to compete more effectively for time-sensitive cargo, shippers will be given more service options in a more competitive carrier market.

At 4-5.

³For example, the Senate Committee report states that Congress amended section 9 "to increase the FMC's authority to prevent and address unjust or unreasonable actions by controlled carriers." The Committee specifically noted that Congress was "concerned about the aggressive growth of certain controlled carriers, and would hope that the new authority under section 9 will allow the FMC . . . to move forward aggressively" to ensure that controlled carriers were not improperly competing with non-controlled carriers. Senate Report No. 61, 105th Cong., 1st Sess. At 26-27 (July 31, 1977).

If these conclusions are valid for vessel operating common carriers ("VOCC's"), they are equally valid for NVOCC's seeking to be rid of cumbersome, anachronistic and costly tariff publication requirements.⁴ Consequently, while APL, COSCO and China Shipping joined in comments filed by the WSC that opposed the exemption sought by the NCBFAA, each has sought to be exempted from requirements of the Act that inhibit their ability to provide efficient service to the shipping public. Again, the Commission should note the self-serving and inconsistent positions those VOCC's have taken on the importance of competition and efficiencies when considering the exemption petition submitted by the NCBFAA.

It is clearly in the Commission's power to exempt parties from the provisions of the Shipping Act when it concludes that the exercise of that authority will result in increased competition and not be detrimental to commerce. By explaining why it should be exempted from the first sentence of Section 9(c) of the Act, APL has vividly explained why the Commission should also grant the relief sought by the NCBFAA in Docket No. P5-03.

Respectfully submitted,



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⁴It is also worth noting China Ocean Shipping Company ("COSCO") and China Shipping Container Lines, as well as APL, are members of the WSC.

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of October, 2004, served a copy of the foregoing Comments Of The National Customs Brokers And Forwarders Association Of America, on the following persons listed below via first-class mail, postage pre-paid:

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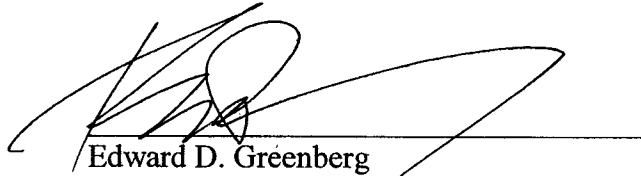
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